

WISCONSIN AND FOX RIVERS, IN WISCONSIN.

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LETTER

FROM

THE SECRETARY OF WAR,

TRANSMITTING

*A draught of a bill to aid the improvement of the Wisconsin and Fox Rivers,  
in the State of Wisconsin.*

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MAY 22, 1874.—Referred to the Committee on Commerce and ordered to be printed.

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WAR DEPARTMENT, May 21, 1874.

The Secretary of War has the honor to acknowledge the receipt of letter of the 6th instant of the Hon. Philetus Sawyer, chairman of the sub-committee on river and harbor bill, informing the Department that there are pending before that committee "several matters connected with the right of the Government to flow lands by means of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin, and affecting the right of the canal company to be relieved from suits brought against it by reason of flowage which took place while the Green Bay and Mississippi Canal Company had control of the improvement; also expenses incurred by the company in maintaining the improvement subsequent to the award of the arbitrators, and prior to its acceptance by the company, and the unpaid expenses incident to the arbitration; the theory upon which the award was made being that the United States should pay what it would cost to build the work, which would, of course, include the cost of acquiring the right to flow the lands injuriously affected," &c., and requesting that a draught of a bill be submitted to meet these points and any other that may occur in connection with this improvement, and to report to the House of Representatives for the information of the Committee on Commerce; that this letter was referred to the Assistant Judge-Advocate-General, with directions to consult with such officer as the Chief of Engineers may select, and prepare a draught of an act for such legislation as may be for the interests of the service.

The report of the Assistant Judge-Advocate-General and draught of a bill to aid the improvement of the Wisconsin and Fox Rivers, which are approved, are herewith transmitted for the action of Congress.

WM. W. BELKNAP,  
*Secretary of War.*

WAR DEPARTMENT,  
Washington, May 21, 1874.

A letter from the House Committee on Commerce to the Secretary of War, dated April 6, 1874, concerning the improvement of the Wisconsin and Fox Rivers, having been referred to me for the preparation of a bill and a general report upon the points mentioned in said letter, I have the honor to submit the draught of a bill to meet those points, as requested by the committee, together with the following report, which has been delayed at the request of the attorney for the Green Bay and Mississippi Canal Company.

The first point mentioned is "the right of the Government to flow lands by means of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin." With reference to this, it may be remarked that both the supreme court of the State of Wisconsin and the Supreme Court of the United States have held that damage to property occasioned by flowage above high-water mark in the improvement by dams of a public navigable river is a taking or seizure of lands within the constitutional inhibition against taking private property for public use without compensation previously made.

The second point is "the right of the canal company to be relieved from suits brought against it by reason of flowage which took place while the Green Bay and Mississippi Canal Company had control of the improvement, \* \* \* the theory upon which the award was made being that the United States should pay what it would cost to build the work, which would of course include the cost of acquiring the right to flow the lands injuriously affected." With reference to this point it may be remarked that the language of the arbitrators in their report to the Secretary of War, dated November 15, 1871, indicating the basis upon which the award was made, is that the improvement "would seem to be worth as much as it would cost to build such works at the present time, deducting a reasonable sum for depreciation by wear and tear." It would be in accordance with that principle for the Government to assume any additional element of necessary cost, which, if ascertained and presented, would have been allowed by the board. At the time the hearing before the arbitrators was had, one suit only was pending against the company for the recovery of compensation for damages by flowage, occasioned by the dams of the company. This suit was at that time decided by the circuit court of the United States in favor of the company, and therefore no estimate of this element of cost was submitted to the arbitrators. Subsequently to the award, the Supreme Court of the United States reversed the decision of the circuit court. The conclusion, therefore, of the attorney for the canal company is believed to be substantially sound:

That inasmuch as the flowage question was not considered by the arbitrators, having necessarily arisen wholly since the award, and the amount to be paid for the right of flow being a part of what it would cost the Government to build the works anew, which, according to the rule laid down by the arbitrators, the Government was by statute required to pay, that sum is not embraced in the award made by them, and inasmuch as the settlement of past and future flowage can be best made together, it is \* \* \* right and in the public interest that the Government should provide for all past flowage not outlawed and take charge of the litigation now pending.

The third point is, "expenses incurred by the company in maintaining the improvement subsequent to the award of arbitrators, and prior to its acceptance." With regard to this it is believed that the United States is under no legal obligation to assume or repay the current expenses of operating the work. The object of the arbitration was

simply to ascertain what would be a just price in case the Government should decide to purchase the improvement. The company agreed to sell for such price as the arbitrators should recommend. After their recommendation the Government decided to purchase, and in pursuance of that decision the property was transferred. Down to the date of formal transfer the title was in the company, and upon them devolved the current expenses in the absence of any agreement to the contrary. But the company ought not to be a loser by reason of making any repairs which the Government would have been obliged to make if it had taken the property at the date of the award, and which may have materially enhanced the value of the works.

The fourth point refers to "the unpaid expenses incident to the arbitration." An appropriation was made June 10, 1872, to pay all the expenses incident to the arbitration, except the compensation of the arbitrator selected by the canal company, and the fee of their counsel. Since the principal object of the proceeding was to furnish information to guide the judgment of the Government, and since Congress has seen fit to pay the general expenses of the board, it would seem to be in harmony with that action to pay the compensation of the arbitrator selected by the company. The company's counsel fee need not be discussed, since it is understood that no application will be made to have it refunded.

The fifth point relates to the "legislation necessary to adjust conflicting rights between the United States and the owners of the water-power." With regard to this matter the attorney for the canal company suggests that "as there is no present pressing necessity for legislation relating to conflicts of interest between water-power owners and the public, the matter being one of difficulty can be more fully considered if postponed to a later session of Congress." It is understood that all the water-leases contain a proviso that the use of the water shall not interfere with the purposes of navigation.

The judge, in the first instance, of the water necessary for navigation should be the officer in charge of the work, and a properly-guarded clause determining this point would not interfere with further legislation calculated to prevent or adjust conflicts of interest concerning the use of the water.

W. M. DUNN,

*Assistant Judge-Advocate-General.*

The Hon. SECRETARY OF WAR.

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A BILL to aid the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin.

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,* That whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin, it becomes necessary or proper to take possession of any lands, or the right of way over any lands, for canals, cut-offs, store-houses, and accessory works of improvement, or the right to permanently flow, saturate, or injure any lands or other property, or to use any earth, quarries, or other material lying adjacent or near to the line of said improvement and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after having first paid, or secured to be paid, the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies, for adjudging the value of private property needed for railway purposes, or by commissioners appointed and directed by the Secretary of War: *Provided, however,* That when the owner of such property shall fix a price for the same, which in the opinion of the said officer in charge shall be reasonable, he may take the same at such price without further delay, and in case of real or mixed property, may receive a conveyance thereof in fee to the United

States. In case any lands or other property has been or is now flowed or injured by means of any part of the works of said improvement heretofore constructed, for which compensation has not been made and is legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation, including all lawful damages for past flowage, may be ascertained in like manner, and upon like conveyances payment may be made. The Secretary of War may employ a competent attorney to represent the interests of the United States in such legal proceedings as may be had under this act, and such as are now pending for flowage-damages hereinbefore occasioned.

SEC. 2. *And be it further enacted*, That a portion of the appropriations made, or to be made, for the prosecution of the improvement aforesaid, not exceeding in amount twenty-five thousand dollars, may be applied in payment for the property taken and used as aforesaid, and in payment of the compensation of the arbitrator selected by the company, and in payment of the expenses incurred in making necessary repairs upon the works of improvement subsequent to the making and prior to the acceptance of the award of arbitrators, under which such works were acquired by the United States, after first applying thereto any excess of the full proceeds of tolls then received over and above the expenses incurred in protecting and operating said works; all expenses to be audited by the Secretary of War.

SEC. 3. *And be it further enacted*, That the Secretary of War is hereby authorized to prescribe such regulations as may in his judgment be necessary in regard to the use of water on the Fox and Wisconsin Rivers, Wisconsin, for manufacturing or other purposes, not inconsistent with the rights of private parties.